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ABSTRACT

According to narrative theory, stories are told when there is a need to resolve conflicts. Like history, the law, too, has the task of choosing among many stories, designating one as "what really happened." Bernard Jackson suggests that judges, in deciding cases, look for "narrative coherence," that is, internal and external logic. Generally speaking, people find stories plausible when they have no gaps, and when they match the narrative models that both experience and culture offer. The People v. Borchers is a particularly disturbing case in which the age, gender, and class bias of an appellate court seems to override the rule of "narrative coherence." While the jury did not believe that Borchers acted in the heat of passion when he killed his mistress, the appellate court did. It constructs a version of the story in which, Dotty, the young victim, sexually and financially exploits a middle-aged insurance broker, aged 45. When the appellate version of the story has been presented in a legal writing course over the past 3 years, students have greeted it with unvarying skepticism. How is it possible, then, that an appellate court could have accepted a story that to other observers is clearly incoherent? The answer is not a cheerful one: the age, gender, and class biases of the male judges blinded them to the story's gaps and inconsistencies. (TB)

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# The Official Version: Incoherence and Credibility in the Appellate Opinion

According to narrative theory, we tell stories when we need to resolve conflicts. As Hayden White says about history, "Unless at least two versions of the same events can be imagined, there is no reason for the historian to take upon himself the authority of giving the true account of what really happened" (79). The law, too, has the task of choosing among many stories, designating one as what really happened. This task is perhaps most obvious at the appeal level, when a multiplicity of stories, from witnesses, lawyers, and even the media, has been reduced to two--the appellant's and the respondent's. Two versions of the same events, both clear, both imaginable--which of them is true? James Boyd White describes the dilemma: "For the actors as for the judges, the juxtaposition of the two incompatible stories makes us ask in what language the story should be told again, and a judgment reached . . . " (266). That final story, the story told by the appellate court, will be the official version. It will give the truth--at least what the law recognizes as truth. And it will have consequences, for human beings, whose fates depend on what the appellate court decides.

It's crucial, then, for the appellate court to arrive at the official version in a morally defensible way. Judges, faced with conflicting accounts of past events, can't simply flip a coin. Nor are they completely free to follow a personal whim, even a strong intuition. We assume that they are bound by logic, by common sense, by the same rule of thumb the rest of us use when we decide whether a story is credible. One legal theorist, Bernard Jackson, sums up this



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rule of thumb as "narrative coherence." Narrative coherence "structures the intelligibility of both fact and law in the adjudicatory process" (1). The truth of a story can't be judged by correspondence to any external reality, he points out, because every witness's story is a constructed reality, and every witness makes "an (unverifiable) claim that we should believe that this constructed reality corresponds to what actually happened" (41). But the coherence of a story can be determined, both internally, by its logic, and externally, by comparison to other stories. Thus we find stories plausible when they have no gaps, and when they match the narrative models that are given to us by both experience and culture.

So what happens when the narrative of an appellate opinion lacks coherence? If the official version is not credible, we might expect the appellate ruling it supports to be weakened, somehow, to lose its authority in the legal arena. However, that hasn't been the fate of all appellate opinions with incoherent narratives. A good example is the 1958 California case that first broadened the definition of "passion" in the heat of passion crime, manslaughter. In 1956, Walter G. Borchers, a Pasadena insurance agent, murdered his young mistress, and stuffed her body into the trunk of his car. He was found guilty of 2nd degree murder by a jury. But the trial judge reduced that verdict to manslaughter, in lieu of granting Borchers a new trial. And the appellate court affirmed that reduction, seeing an obvious case of passion where the jury had been convinced there was malice. People v. Borchers set several useful precedents, for heat of passion crimes. It expanded the provocation needed from a single quarrel or provoking act to a "series of events;" so while no event in itself would be enough to incite murder, the cumulative effect of these events might be sufficient provocation. Borchers also loosened the definition of "passion." It need not be rage or anger, but could be any intense emotion. Both these rules

proved important in later heat of passion cases, considerably expanding the parameters of what could be seen as manslaughter rather than murder.

Yet the story that the court tells here is not coherent, by either of Jackson's criteria. It is neither internally logical, nor does it match the narrative model of murder that common experience gives us, or that common sense suggests. Before I discuss the implications of this discordance between theory and reality, let me give you a sense of the story itself.

Or perhaps I should say stories, since there were several. The story most people heard first was told by the media. Borchers' crime was headline news in the LA Times for several days in October of 1956. The breaking story on Friday relayed Borchers' original claim that the shooting was accidental; it also emphasized the murderer's status, and his victim's beauty: "A wealthy Pasadena insurance broker surrendered to police there yesterday and told them he had shot his pretty, red-haired sweetheart to death and then driven around for more than 24 hours with her body in the trunk of his car" (12 October 1956). Pictures reinforced those images. Borchers appears in a serious shot that fits the description offered: "In appearance he's meek, dapper and balding" (12 October 1956). The victim is shown in two shots, one of them a seductive, leggy pose on the hood of a car. Her brother also gets a picture, and the chance to accuse Borchers of killing his sister in cold blood. By the next day, the Times had decided where its sympathies lay. Borchers becomes the romantic hero in their headline: "Pasadena Broker Tells of Fatal Kiss/Gun Went Off, Killed Woman as Lips Met, Weeping Suspect Says" (13 October 1956). In this day's pictures, Borchers sobs, the victim appears in yet another provocative pose, and the brother looks thoughtful, but has lost his voice. By Sunday, the victim is firmly established as the "red-haired beauty," and also the probable source of Borchers' economic problems, while

Borchers, the Times notes, is visited by three ministers, all close friends (14 October 1956).

Whether or not the jury accepted this sympathetic media portrait, they did not agree that Borchers had acted in the heat of passion . Instead, they found him guilty of 2nd degree murder--they agreed with the story the prosecution told, a story of malice. That story, effective as it may have been is not easily accessible--and I have tried, but it's not easy to get to the briefs filed in an appellate case. But traces of that story remain, in the narrative of the appellate opinion. And these traces pull against the sympathetic tale the judge wants to construct.

The appellate narrative adopts most of the media version. Borchers is introduced as "a Pasadena insurance broker, aged 45" (People v. Borchers, 50 C.2d.321 at 323), while the victim is referred to throughout only as "Dotty." This nickname suits the portrait the narrative offers, of the beautiful young woman financially and sexually exploiting the middle-aged man. The victim's real name, Mary Dorothy McCully, is suppressed, probably because it not only suggests an uncomfortable reality, a family grieving for her, but a propriety that the frivolous "Dotty" wouldn't have.

This initial contrast, however, is undercut by an inconvenient fact. Dotty has in tow a four year old child, making her a responsible mother rather than a playgirl. The narrative steps around this inconsistency by noting that the child is "illegitimate" (Borchers, 323), but assigning him no parents. In fact, Tony was the child of McCully's ex-husband and another woman, and McCully had voluntarily taken him with her when she left. The judge is well aware of this connection; he makes a point of mentioning the ex, by his gambler's nickname, "'Chicken Louie'" (Borchers, 324). His omission of the bastard child's parentage leaves the impression that McCully herself was the unwed mother. Still, Tony's existence is inconvenient, not only because it

interferes with the character development of the story, but because it undermines Borchers' story of the murder itself.

A month before the murder, Borchers had hired a private investigator to check on some of his mistress's associates. Fagg, the P.I., told him that these men were hoodlums, and plotting with McCully to murder him for insurance money. He also revealed that she was sleeping with at least one of them. This information certainly puts McCully in a bad light; it also threatens Borchers' claim to heat of passion. He now has a motive for a malicious murder of the woman who has cheated on him and is planning to murder him. So the narrative turns to Borchers' own account for redemption: "Defendant in his testimony repeatedly emphasized his devotion to Dotty and his complete disbelief that she was plotting against him with the 'hoodlums'" (Borchers, 324). Blind passion might well refuse to believe unsolicited gossip about its beloved object--but Borchers hired this detective himself. At best, his devotion was mixed with suspicion.

In Borchers' account of the murder itself, which the appellate narrative adopts without question, all mention of plots and infidelity disappears. The provoking behavior was instead suicidal--McCully, afraid that she wouldn't be allowed to adopt Tony, took Borchers' gun out of the glove compartment, loaded it, and threatened to kill both her lover and herself. Borchers tried to talk her out of it, got the gun away from her, and kissed her. But McCully taunted him with his cowardice, saying, " 'Go ahead and shoot, what is the matter, are you chicken' " (Borchers, 326).What we hear next is a very indirect description: "Defendant heard the explosion of the gun as he shot Dotty in the back of the head" (Borchers, 326). The effect is simultaneous with the cause, almost as if the explosion preceded any conscious pulling the trigger.

Despite that artful presentation, the murder story is problematic. Putting aside for the moment the question of whether a desire for suicide should be seen as provocative,

we still have the paradox of this death wish in a woman who supposedly holds all the cards. Borchers had paid her bills, bought her a car, even redeemed her pawned jewelry. He knew about her sexual indiscretions, and supposedly forgave her. Until this fatal moment, there has been no discussion of any threat to her care of Tony--in fact, the narrative has offered plenty of reasons for Borchers' despondency, but none for hers. Nor does she seem prepared for this suicidal scene; it's Borchers' gun that she supposedly takes out and loads. The narrative doesn't remark on that gun (and ammunition) in the glove compartment, as if it were the normal accoutrement of insurance agents in Pasadena in 1956. Still there is a tug here. Borchers has some good reasons to kill; we have to take his unverifiable word for it that McCully wanted to die. (Her family, not surprisingly, vehemently denied both that she was suicidal and that she knew how to load a gun, but their testimony never made it into the legal record.)

Borchers' behavior after the murder is also problematic. First, that head shot didn't kill his victim. In fact, another driver testified that McCully's hands were on the horn, and that Borchers pushed them away, and pushed his victim to the floor. By his own admission, Borchers made several trips to his office, while McCully was still alive, and "'moaning very softly'" (Borchers, 326). The narrative quotes Borchers himself next: ". . . 'to put her out of her misery'" (Borchers, 327), he struck her on the head with the gun. Even here, it avoids saying that he killed her. Every the tragic hero, Borchers "held her and tried to talk with her and finally became aware that she was dead'" (Borchers, 327). In case this pathetic scene isn't enough to distract us from the brutality of that blow, the narrative notes that McCully's death was inevitable. The blow of the gun only "accelerated death" (Borchers, 327).

By now, we can see through the increasingly troubled waters of this story the outlines of the more sinister tale,

the one the prosecutor told the jury. A man betrayed and suspicious of his lover's plots stashes a loaded gun in his car, takes his sweetheart for a drive on a deserted road, struggles with her for the gun, and shoots her. When she doesn't die quickly, he insures her silence with a blow to the head. In what follows, the outlines of this story of malice become ever clearer, as the official version limps to its conclusion.

Borchers put McCully's body in the trunk, and drove 140 miles out of the city, to a camp site. The narrative tells us he went out there to kill himself; we suspect he meant to dump the body. He removed McCully's engagement ring--from sentiment, or to prevent identification? He bought money orders, and told the clerk he planned a trip to Mexico. The narrative counters this with his subsequent explanation to police that he didn't want cash found on his body after he committed suicide. But he didn't kill himself. He ate lunch, drove back to Pasadena with the dead body in the trunk, and looked up Fagg, his private eye. To him, after some discussion, he first confessed the circumstances of the killing.

This brief analysis doesn't do justice to the oddities of the narrative, as a credible account of a murder. So let me add to it my students' reactions--I use this case in a legal writing course, and over the past three years, it has been greeted with an unvarying skepticism. In fact, most students accuse the judge of deliberate manipulation. I agree with those legal theorists who acquit judges of any conscious deception (Jackson, 93; Papke), but that leaves the problem of coherence. How could a trial judge, and then a whole appellate court, accept this logically inconsistent story as the credible version? (Note here that the issue is only whether this murder was passionate or malicious; there were no other technical points to consider, like procedure at the trial.)

The solution I propose is not a cheerful one. It is that the legal system was so male-dominated that the incoherence of a narrative was invisible, as long as that narrative satisfied certain cultural expectations. And Borchers' story does that in three areas: age, gender and class. The very first newspaper articles set up the classic case of the older man being exploited by the younger woman. Borchers is conveniently bald and bespectacled, McCully conveniently has a lurid past and that seductive red hair (which, the appellate opinion takes care to tell us, is a dye job). His obsession with her, although pitiable, is understandable; her affection for him necessarily suspect. The judges looking at this case, in 1958, were probably, like Borchers, middle-aged. Without being conscious of it, they could have felt that thrill of identification--"This could happen to me!"

Male dominance also explains the easy acceptance of suicidal desire as provocation, a strategy not unique to Borchers' case but almost endemic in legal narratives of jealous passion. We might see this as simply mitigating the terror of these murders, since the victims supposedly wished for death. But there is also a sort of moral lesson in the plot. The woman guilty of sexual infidelity deserves to die--and her suicidal desire, even if unconnected to the infidelity, serves as a tacit acknowledgment of her guilt. By using it as provocation, the court also escapes the uncomfortable need to find a man malicious for simply doing what the patriarchal culture has traditionally allowed--punishing sexual treason with death.

Finally, the story of Walter Borchers and Mary Dorothy McCully reflects a class conflict. We see this most clearly in the way the appellate narrative diverges from the newspaper reports. Miss McCully, with a law student brother from Texas flying to her defense, is the social equal of Borchers, the insurance agent and former minister. But Dotty, unclaimed child at her side, once married to the Mob,

sexually promiscuous and living well on other people's largesse, represents the underclass; whatever her origins, she has fallen from grace. She is less a victim than a victimizer, that anarchic female who can bring the solid male citizen to ruin. By transforming Miss McCully, beloved daughter and sister, into Dotty, the glamorous vamp, the court not only dampens our sympathy, but affirms the right of the industrious middle-class to protection against the wiles of the needy.

Finally, there is the larger problem of common sense. Jackson relies on it, as a sort of test for the credibility of a legal narrative; if my analysis of Borchers is correct, it doesn't always work. My broader research into heat-of-passion cases suggests that it often doesn't work--or that "common sense" is not exactly common. Some jurists are beginning to acknowledge a gender split, evident in the debate over the use of "reasonable woman" in certain statutes. For other practitioners, the very phrase is troubling--does it mean that a man might see as reasonable what a woman would not? Yesterday, John Campbell delineated a different sort of rift, between the "culture of expertise" and the "culture of common sense." He sees his role as a rhetorician, or teacher of rhetoric, as mediating the tension between the two. I'm not sure he'd agree that either was not reasonable, in its <u>real</u> form. Faked expertise may be nonsense, but authentic expertise should be an extension of common sense. Yet in these cases I've been discussing, in <u>Borchers</u> in particular, it's not. The culture of expertise, however, is also a culture of the elite, the established, the patriarchs. And what makes sense to them may not make sense to the rest of us.

This is troubling, because this culture has authority. And here I must use a more recent illustration, with apologies to those of you not from LA, who don't care what happens to OJ. Whenever I'm willing to dismiss the oddities of <u>People v. Borchers</u> as simply due to the unenlightened

50's, I remember the Dream Team, the phalanx of the best of the best, defending our current spousal homicide defendant. Common sense might be best reflected in Dennis Miller, live on HBO, spluttering, "We all know he's guilty! C'mon!" But in this case, too there is a more powerful sense operating, that sense of privilege that can find the incoherent coherent, and the improbable, likely.

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